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NO. 934

IN THE

Supreme Court of the United States

October Term, 1966

LAN JING-CHAU, ET AL., *Petitioners*

-versus-

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL., *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners Lan Jing-Chau, et al., respectfully move this Honorable Court for a rehearing of its order entered herein on February 20, 1967, denying the petition for writ

of certiorari, and again prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition filed herein January 4, 1967, and would respectfully show that for this there exist intervening circumstances of substantial or controlling effect and other substantial grounds available although not previously presented. Petitioners have studied the motion for rehearing being filed herein by China Union Lines, Ltd., in Cause No. 933, October Term, 1966, and believing the grounds therefor presented under its Second Point are completely sound, in an effort to save the time of this Honorable Court and at the same time comply with its rules relative to motions for rehearing and so to preserve their rights herein, petitioners simply adopt as the grounds for this their motion the Second Point set forth in the motion for rehearing being filed therein in said Cause No. 933, October Term, 1966, as follows:

GROUND FOR ALLOWING REHEARING AND FOR GRANT OF WRIT OF CERTIORARI

1.

Dismissal (on Demurrer) of Libels Against American Cyanamid Company

The trial Court freed American Cyanamid Company, the manufacturer-shipper of the chemical cargo the Court found toxic and dangerous as well as inflammable, on the ground that the law imposed on it no greater duty toward third persons than to warn the carrier of the dangerous properties of the toxic chemical, which was done.

The Court of Appeals' only reference to this duty of the manufacturer-shipper of the chemicals which the trial Court had clearly found were toxic and dangerous was to say that it

> " . . . assumed that liability would attach to Cyanamid if the evidence disclosed a breach of duty, tortious or contractual",

But it then held American Cyanamid free from liability for the same reasons it affirmed that the carrier had been rightfully exonerated from any liability.

The trial Court upon ample evidence found that the chemical which escaped and here caused the deaths, personal injuries and nearly all of the large property losses was lethally toxic and dangerous to health and that such properties were well known to the manufacturer-shipper and the carrier. Nevertheless both it and the Court of Appeals failed to follow the statute (46 U.S.C. §391a) governing *bulk* shipments on tank vessels as here and the Coast Guard regulations made pursuant to *that statute*, 46 C.F.R. §§39.01-1 and 39.05-1(a) and 146.25-10, which expressly forbade *transportation in bulk* in the wing tanks of *tank vessels* of inflammable liquids known to be toxic. Instead the Court of Appeals erroneously followed the trial Court in applying here the Interstate Commerce Commission classification for inflammables shipped in *containers* on *cargo* vessels (not *bulk* chemicals shipped in tank vessels) adopted pursuant to the provisions of 46 U.S.C. § 170 by the Coast Guard, printed at 46 C.F.R. § 146.21-100.

Since the statutes and regulations made pursuant thereto in clear language impose on all concerned with their

handling the duty toward *everyone* to comply with the regulations for safe transportation of dangerous substances, dissenting Circuit Judge Brown was clearly right in stating neither Court applied the proper standard of care to the duty of American Cyanamid Company.

The decision below is thus squarely contrary to statute.

It is also in direct conflict with the decision of all the judges *en banc* where dangerous products are concerned of the Court of Appeals in *Simpson Timber Co. v. Parks*, 369 F.2d 324, at 328-329, and 331 et seq. (9 Cir. 1966). (The record in that case has now been lodged with the Clerk of this Court, having been forwarded on February 17, 1967, petitioner is informed, and in which petitioner is assured a writ of certiorari will be sought to review the decision of the majority, which freed the product manufacturer from liability where the product was an ordinary object not inherently dangerous as was the chemical here.)

Petitioner respectfully submits that the fact findings of the trial Court have been disregarded, and that the decision below in completely exonerating from liability a manufacturer-shipper of a lethally toxic, inflammable liquid who knowingly permits its bulk transportation in the wing tanks of a tank vessel, which was in direct contravention of the applicable Coast Guard regulations lawfully promulgated pursuant to statute, is clearly erroneous. It is as well with respect to the duty of a manufacturer-shipper of a dangerous product contrary to decisions by other Courts of Appeal. Writ of certiorari should therefore be granted.

STATUTES AND REGULATIONS INVOLVED

STATUTES HERE PERTINENT

46 U.S.C. § 170—Regulation of carriage of explosives or other dangerous articles on vessels—Vessel defined.

"(1) The word 'vessel' as used in this section . . . shall not include any . . . vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in its own tanks . . ."

* * *

"Transportation, etc., of other explosives or other dangerous articles; exceptions

"(6) (a) It shall be unlawful knowingly to transport . . . except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: . . .

"(b) This subsection shall not apply to—

* * *

"(vi) inflammable or combustible liquid cargo in bulk: Provided, however, That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title."

"Regulations for protection against hazards created by explosives or other dangerous articles.

"(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)- (5) or (6) of this section apply—

"(a) The Commandant of the Coast Guard shall . . . classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of

this section with respect to the descriptive names . . . and certification of such explosives or other dangerous articles . . . and *shall accept and adopt for the purposes above mentioned in this subsection such . . . classifications,* specifications of containers, packing, marking, labeling and certification of explosives or other dangerous articles or substances *to the extent as are or may be established from time to time by the Interstate Commerce Commission* insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water.

46 U.S.C. § 391(a)—Vessels having on board inflammable or combustible liquid cargo in bulk.

"(1) Vessels included

"All vessels . . . that shall have on board any inflammable or combustible liquid cargo in bulk . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: . . .

"(2) Rules and regulations for handling liquid cargo

"In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary . . . with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; . . ."

Coast Guard Regulations Pertinent

46 C.F.R. § 39.01-1—Scope of regulations—TB/ALL*.

"(a) The regulations in this part contain requirements for the transportation of inflammable or combustible liquids having lethal characteristics and de-

fined as Class 'B' or 'C' poisons in §§ 146.25-10 . . . of this chapter. . . ."

(*TB/ALL by definition, 46 C.F.R. § 30.01-5(c) means tank ships and barges plying all waters.)

46 C.F.R. § 39.05-1—Design, construction, and arrangement—TB/ALL.

"(a) Cargo having a Reid vapor pressure not exceeding 14 pounds per square inch *may be transported* . . . in tanks built integral with the vessel's hull and *completely separated from the shell of the vessel by means of wing tanks,* cofferdams, double bottoms or similar voids."

46 C.F.R. § 146.01-1—Purpose of regulations.

"The purpose of the regulations in this subchapter is to promote safety in the handling, stowage, storage and transportation of explosives or other dangerous articles or substances, and combustible liquids, as defined herein, on board vessels on any navigable waters within the limits of the jurisdiction of the United States . . ."

46 C.F.R. § 146.02-5—Compliance.

"The applicable provisions of the regulations in this part shall be observed by:

(a) All vessels, domestic or foreign, subject to the regulations in this part, and the owners, charterers, agents, masters or persons in charge of such vessels;

* * *

"(c) All shippers, their agents or other persons offering explosives or other dangerous articles or substances and combustible liquids for transportation on board vessels;"

46 C.F.R. § 146.25-10—Less dangerous poisons, Class B, liquids and solids, poison label.

"(a) Poisonous liquids or solids (including pastes and semi-solids), other than Class A, C, or D poisons,

which *are known to be so toxic to man as to afford a hazard to health during transportation,* or which, in the absence of adequate data on human toxicity, are presumed to be toxic to man because they fall within any one of the following categories when tested on laboratory animals: . . .

CONCISE AMPLIFICATION OF GROUND FOR ALLOWING REHEARING AND GRANT OF THE WRIT

POINT

Dismissal (on Demurrer) of Libels Against American Cyanamid Company

STATEMENT

After petitioner and the other libellants against American Cyanamid Company had rested their case in chief, American Cyanamid Company demurred and on demurrer the trial Court dismissed the libels. R. 3454-3455. In so doing it stated that the law imposed on the manufacturer and shipper (here of course American Cyanamid Company) of an "inherently dangerous commodity" "the duty to warn and advise others . . . of its dangerous propensities." It went on to find "the evidence shows clearly that that was done, and that the carrier was fully advised of the dangerous characteristics of the cargo". And the libels were accordingly dismissed.

In the trial Court's decision, after finding that the BEREAN loaded tons of acrylonitrile in the three No. 1 tanks, of which of course one was the No. 1 port tank, it found

> "11. Acrylonitrile is similar to gasoline in its burning and explosive characteristics. However, it is highly toxic, and gives off poisonous and dangerous fumes. These fumes will cause illness to a person exposed thereto in relatively weak concentrations over a prolonged period of time; and may cause illness or death from a single exposure if in a sufficiently high concentration. The symptoms of acrylonitrile poisoning are somewhat similar to those of cyanide poisoning. . . ."

The Court then referred to the chemical's Coast Guard classification in 46 C.F.R. § 146.21-100 as an inflammable liquid and not as a poison. (R. 5124.)

By its next two Fact Findings the trial Court found that while the collision was not severe the No. 1 port tank of the BEREAN was breached, "causing its acrylonitrile cargo to become ignited and explode. Quantities of the burning liquid were thrown upon the foredeck of UNION RELIANCE which in turn was ignited", and as a consequence eleven persons were killed, others injured, and the UNION RELIANCE lost, along with much of her cargo. (R. 5130.)

The trial Court then found that the place of carrying the cargo violated no Coast Guard regulations nor was it negligence. R. 5136-5137. No reference was made to the statute (46 U.S.C. §391a) which requires all concerned with placing dangerous substances *in tank vessels* in waterborne commerce to comply with applicable Coast Guard regulations, nor those regulations, 46 C.F.R. §§ 39.01-1 and 39.05-1, which require carriage of such dangerous cargoes in tanks "completely separated from the shell of the vessel by means of wing tanks".

The Court of Appeals affirmed the decision of the trial Court as one lawfully based upon substantial evidence. It made only a passing reference to the duty of a manufacturer-shipper of dangerous products, saying that liability

was "assumed had there been a breach of duty, tortious or contractual".

Dissenting Circuit Judge Brown, however, held that certainly a prima facie case of liability had been made out against American Cyanamid Company and stated that neither Court had "faced up" to the law governing the manufacturer-shipper of dangerous commodities well known by it to be dangerous.

The ultimate decision in *Simpson Timber Co. v. Parks, supra,* will have a direct bearing on the law in this case; as it now stands, the two decisions are of course in direct conflict.

ARGUMENT

Petitioner respectfully submits that the trial Court here, upon a great deal of ample evidence, has found that the chemical cargo in addition to being inflammable and explosive was "highly toxic, and gives off poisonous and dangerous fumes" which can cause illness and death. It is so specifically found in paragraph 11 of the Fact Findings, R. 5124, and likewise found when the libels against the manufacturer-shipper were dismissed. It further found that both American Cyanamid Company and the carrier had knowledge of these dangerous properties. R. 3454-3455, as above stated.

Such findings therefore bring the chemical and all concerned with its handling in tank vessels in water-borne commerce within the purview of the statute regulating such vessels carrying *inflammables in bulk,* 46 U.S.C. § 391a, and duties imposed upon such persons by Coast Guard regulations made under the authority of that statute (46 U.S.C. § 391(a)(2)), namely those set forth in 46 C.F.R. § 39.01-1, 46 C.F.R. § 39.05-1, and 46 C.F.R. § 146.25-10:

The first such regulation, 46 C.F.R. § 39.01-1, states that the regulations contain requirements for transportation of "inflammable or combustible liquids having lethal characteristics" and defined as Class "B" or "C" poisons in § 146.25-10 . . . of this chapter. The second such regulation, 46 C.F.R. § 39.05-1, prohibited carriage of such a liquid in a wing tank, as it was here carried. And the third such regulation, 46 C.F.R. § 146.25-10, defined the inflammable liquid having lethal characteristics the carriage of which in tank vessels was being so regulated as

> "Poisonous liquids . . . which *are known to be so toxic to man as to afford a hazard to health during transportation* . . ."

The trial Court having so expressly found on ample evidence that the chemical here was lethally toxic, and thus afforded a hazard to health in transportation, the statutory and regulatory purposes of the regulations to protect the public by compelling transportation as directed by the regulations were here clearly breached, and American Cyanamid was erroneously relieved from liability.

The Courts below are in obvious error in relying so heavily on the classification of the chemical by the Coast Guard only as an inflammable liquid in 46 C.F.R. § 146.21-100. Under the provisions of the statute *governing article shipments on vessels other than tank vessels;* 46 U.S.C. § 170(7)(a), the Commandant of the Coast Guard is *required* for such *article* shipments to accept the Interstate Commerce Classification, the statute providing

> ". . . the Commandant of the Coast Guard . . . shall accept and adopt for the purposes . . . of this subsection such . . . classification . . . of explosives or other dangerous substances . . . as are or may be

established from time to time by the Interstate Commerce Commission . . ."

The Commandant so interprets his obligation under this statute: Proceedings of the Merchant Marine Council, United States Coast Guard, Vol. 24, No. 2, February, 1967, page 32, which sets forth in inviting attendance at a hearing on proposed changes in regulations, including Dangerous Cargo Regulations,

> ". . . R.S. 4472, as amended (46 U.S.C. 170), requires that the Coast Guard accept and adopt such . . . classifications . . . of containers, packing . . . and certification of explosives or other dangerous substances . . . as are or may be established . . . by the Interstate Commerce Commission. . ."

This was a shipment *in bulk,* aboard a *tank vessel* and not an article carried aboard a *cargo* vessel, for which the classification at 46 C.F.R. § 146.21-100 shows that classification is intended. The statute, 46 U.S.C. § 170(6)(a)(vi), plainly states handling *in bulk* "shall be subject to the provisions of section 391a of this title", under the authority of which as shown the Coast Guard forbids shipment of liquid poisonous inflammables known to be toxic to man in wing tanks.

The chemicals here were found by the trial Court lethally toxic, inflammable, and explosive on ample evidence. Under the provisions of 46 U.S.C. § 391a and the authorized Coast Guard regulations 46 C.F.R. §§ 146.01-1 and 146.02-5 it was the statutory duty of American Cyanamid Company (as well as of the BEREAN) to comply with the requirement that this cargo be carried in tanks protected by wing tanks. The trial Court has expressly found that the collision breached only the wing tank, and it has thus found that

the great deaths and losses here directly resulted from breach of the applicable statutory regulations.

The Court of Appeals was therefore in clear error in holding otherwise, and dissenting Circuit Judge Brown clearly correct in stating both Courts failed to apply the lawful standard of care in this case.

PRAYER

Petitioner prays that its motion for rehearing of its petition for issuance of writ of certiorari be granted, and that thereafter the writ issue, restricted if the Court should so determine proper to the issues herein set forth but if permissible under the rules on all grounds heretofore set forth in the petition.

Respectfully submitted,

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CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered February 20, 1967, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

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